Supreme Court, U.S.
FILED
OCT 2
[redacted] 1985
JOSEPH F. SPANIOL, JR.
CLERK

(4) (5) (5)

Nos. 84-902, 84-922 and 84-1041

In The
Supreme Court of the United States
October Term, 1985

---

Wardair Canada Inc., Appellant
v.
Florida Department of Revenue

---

Lineas Aereas Costarricenses, S.A.,
et al., Appellants
v.
Florida Department of Revenue

---

Air Jamaica Limited, et al., Appellants
v.
Florida Department of Revenue

---

On Appeal From
The Supreme Court of Florida

---

# Appellee's Reply Brief to Amicus Curiae

---

JIM SMITH
Attorney General

WILLIAM TOWNSEND
General Counsel
STEPHEN KELLER
Asst. Gen. Counsel
Department of
Revenue
The Carlton
Building
Tallahassee, FL
(904) 488-0712

MITCHELL D. FRANKS
Chief Trial Counsel

JOSEPH C. MELLICHAMP,
III, Assistant
Attorney General
The Capitol
Tallahassee, FL
(904) 487-2142

BEST AVAILABLE COPY

TABLE OF CONTENTS


| | PAGE |
|---|---|
| TABLE OF CONTENTS | i-ii |
| TABLE OF AUTHORITIES | iii |
| POINTS I AND II | 1 |

POINT I. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION BECAUSE ALL ISSUES RAISED BY THE AMICUS HAVE BEEN FORECLOSED BY PRIOR DECISIONS OF THIS COURT.

POINT II. THE DECISIONS OF THE SUPREME COURT OF FLORIDA ARE CONSISTENT WITH PRIOR DECISIONS OF THIS COURT ON THE INVOLVED ISSUES OF LAW, MANY OF WHICH ARE CITED IN THE SUPREME COURT'S DECISIONS, AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISIONS IN THIS CAUSE DEPENDS, ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

A. THE FLORIDA SUPREME COURT'S DECISIONS ARE CONSISTENT WITH THIS COURT'S DECISION IN JAPAN LINE, LTD. V. COUNTY OF LOS ANGELES, 441 U.S. 434 (1979).

B. NONE OF THE AIR TRANSPORT INTERNATIONAL AGREEMENTS EXEMPT FOREIGN AIRLINES FROM IMPOSITION OF A STATE EXCISE TAX ON THE PURCHASES OF FUELS IN A STATE OF THE UNITED STATES.

| | PAGE |
| --- | --- |
| DISCUSSION | 1 |
| CONCLUSION | 11 |

## TABLE OF AUTHORITIES


| CASES: | PAGE |
|---|---|
| Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), reh. den. 430 U.S. 976 | 3 |
| Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983) | 2 |
| Guarantee Trust Co. v. United States, 304 U.S. 126 (1938) | 2 |
| Hines v. Davidowitz, 312 U.S. 52 (1941) | 2 |
| Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) | 1, 2, 3 4, 5 |
| United States v. Pink, 315 U.S. 203 (1942) | 2 |

MISCELLANEOUS:

| | |
|---|---|
| ICAO's Policies on Taxation in Field of International Air Transport, ICAO Doc. 8632-C/968 (Nov. 1966) | 8 |

## POINTS I AND II

POINT I. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION BECAUSE ALL ISSUES RAISED BY THE AMICUS HAVE BEEN FORECLOSED BY PRIOR DECISIONS OF THIS COURT.

POINT II. THE DECISIONS OF THE SUPREME COURT OF FLORIDA ARE CONSISTENT WITH PRIOR DECISIONS OF THIS COURT ON THE INVOLVED ISSUES OF LAW, MANY OF WHICH ARE CITED IN THE SUPREME COURT'S DECISIONS, AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISIONS IN THIS CAUSE DEPENDS, ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

A. THE FLORIDA SUPREME COURT'S DECISIONS ARE CONSISTENT WITH THIS COURT'S DECISION IN JAPAN LINE, LTD. V. COUNTY OF LOS ANGELES, 441 U.S. 434 (1979).

B. NONE OF THE AIR TRANSPORT INTERNATIONAL AGREEMENTS EXEMPT FOREIGN AIRLINES FROM IMPOSITION OF A STATE EXCISE TAX ON THE PURCHASES OF FUELS IN A STATE OF THE UNITED STATES.

## DISCUSSION

These cases do not present a substantial federal question concerning the power of a state to levy an excise tax imposed upon the privilege of engaging in the business of selling tangible personal property which includes

aviation fuel (See 84-921, A.C. 7). The decisions of the Supreme Court of Florida are consistent with prior decisions of this Court in the Guarantee Trust Co. v. United States, 304 U.S. 126 (1938); United States v. Pink, 315 U.S. 203 (1942); Hines v. Davidowitz, 312 U.S. 52 (1941); Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983) and Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

The Amicus contends that the instant decisions of the Florida Supreme Court and thus Florida's excise tax, are inconsistent with federal policy as it relates to the taxation of aviation fuel purchased by foreign airlines, while in the United States, and this Court's decision in Japan Line. Based on those premises, Amicus argues that Florida's tax should be declared

unconstitutional as applied.

In Japan Line, this Court set forth two additional requirements to the "four prong" test referred to in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), reh. den. 430 U.S. 976. The first was whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and second whether the tax prevents the federal government from "speaking with one voice when regulating commercial re-- lations with foreign governments." The decisions of the Florida Supreme Court are consistent with the Japan Line and meets both of the additional tests.

As stated by Amicus (See 84-902, A.C. 30), the "multiple taxation" aspect of Japan Line is not a concern in the instant cases. Appellants did not prove - indeed they have not argued - that Florida's sales tax on aviation fuel

"produces multiple taxation in fact" (Japan Line, 441 U.S. at 452). Additionally Amicus did not think that Florida's sales tax "creates a substantial risk of international multiple taxation" (id. at 451)(See 84-902, A.C. 30). The decisions of the Florida Supreme Court are consistent with these observations.

However, Amicus nevertheless suggests that Florida's excise tax, prevents the United States from speaking with one voice thus it fails to meet the second test in Japan Line, and thus is unconstitutional as applied.

First, it should be pointed out that Amicus' statement that fuel should be likened to the containers involved in Japan Line is incorrect. The containers in Japan Line were in fact instrumentalities used for shipping property into the United States.

The containers would be likened to the aircraft themselves and not to the fuel which is consumed by the aircraft in flying into the United States. Thus, Amicus' statement that the fuel is an instrumentality of commerce is totally incorrect. Furthermore, Amicus is incorrect in stating that Florida imposes a tax on aviation fuel. This is not true. Florida's tax is an excise tax imposed upon the privilege of engaging in the business of selling tangible personal property which includes fuel (See 84-921, A.C. 7). The excise tax is imposed on the vendor or dealer and is a privilege tax not a property tax as suggested by Amicus, and which was before this Court in Japan Line. Florida's excise tax on the privilege of engaging in business is totally dissimilar from the ad valorem property tax imposed on the

property itself, in that case, the containers.

Second, contrary to Amicus' contention, Florida's tax does not create an asymmetry in the international tax structure which operates automatically to foreign nations' disadvantage. Amicus leaves the impression that prior to 1983, Florida granted foreign airlines a proration of the tax which was not granted to domestic airlines in international commerce (See 84-902, A.C. 18). In fact, at that time both foreign and domestic airlines, operating over international routes, and traveling only briefly in Florida's airspace, were granted the proration on a mileage basis. With the abolishing of the proration of the tax on the aviation fuel purchased by, either domestic or foreign airlines, both foreign and domestic airlines continue

to be treated equally by Florida. Today, as in the past, Florida provides equal, symmetrical treatment to foreign and domestic airlines in this taxation of sales of fuel purchased in Florida.

It is therefore incorrect to say that the Florida tax "operates automatically to foreign nations' disadvantage." This is a pure sales tax imposed upon the privilege of engaging in the business of selling tangible personal property which includes aviation fuel, irrespective of its use, whether in domestic or foreign commerce. The incident upon which the tax is imposed occurs prior to any commitment of the aviation fuel to any commerce, foreign or domestic. The tax is clearly neutral in its treatment of foreign airlines. It is therefore consistent with the federal policy of nondiscriminatory treatment of foreign

airlines.

Third, Florida's tax is not contrary to the expressed federal policy nor does it impermissibly implicate foreign affairs. In analyzing this tax and foreign affairs, an examination must be made of the "one voice" doctrine. Florida contends that its tax does not interfere with the authority of the United States to regulate commercial relations with foreign governments.

In the international compacts (See 84-902, A.C. 10-16), the federal policy expressed is a spirit of equality of opportunity and treatment. The ICAO's Resolution (See 84-902, A.C. 11), passed under the Chicago Convention on International Civil Aviation, implements the Convention's purpose: to avoid discrimnation against airlines among contracting states. The Conven-

tion, as Amicus states (See 84-902, A.C. 10) exempts only aviation fuel and supplies which are "on board an aircraft." The Resolution, by extending this practice to include state taxes on sales of fuel and supplies was in furtherance of assuring "equitable treatment for international aviation" (84-902, A.C. 12). The Florida tax is certainly consistent with equality of treatment and it is consistent with federal policy as expressed in the international compacts.

While Amicus states that the international compacts "differ in subtle ways" (84-902, A.C. 34), it can be stated without equivocation that the agreements do not expressly preempt state taxes, such as the Florida tax involved in the instant case. (84-902, A.C. 17 and 32).

Federal policy is enunciated by its expression in the official international compacts. This federal policy expresses a pattern, by these international compacts, which falls short of any prohibition upon state taxation of aviation fuel purchased by foreign airlines. Clearly, in this area, the federal government has spoken with one voice to accomplish equality of treatment.

The Amicus is requesting this Court to ignore these international compacts and the expressed federal policy by asking this Court to amend or rewrite these agreements to include an exemption from state excise taxes.

The federal government's "one voice" has spoken, and it says to treat all airlines equally, in every respect and to make sure there is no discrimination in favor of domestic

airlines against the foreign airlines. The Florida tax does not violate this federal policy. The outcome of this case should indeed be dictated by this federal policy and as enunciated in the particular compacts, which in their "idiosyncratic provisions" have set forth a federal policy which places no restrictions on the state's power to impose a nondiscriminatory tax, such as Florida's, upon the privilege of engaging in the business of selling tangible personal property which includes aviation fuel.

## CONCLUSION

Based on the foregoing reasons, the Appellee urges the Court to grant its Motion to Dismiss the appeal or to affirm the decisions of the Supreme Court of Florida. These appeals do not present a substantial federal

question as the decisions of the Supreme Court of Florida are consistent with prior decisions of this Court, and it is manifest that the questions on which the decisions in these cases depends are so insubstantial as not to need further argument.

Respectfully submitted,

JIM SMITH
Attorney General

WILLIAM TOWNSEND
General Counsel
STEPHEN KELLER
Asst. Gen. Counsel
Department of Revenue
The Carlton Building
Tallahassee, FL
(904) 488-0712

MITCHELL D. FRANKS
Chief Trial Counsel
JOSEPH C. MELLICHAMP, III, Assistant Attorney General
The Capitol
Tallahassee, FL
(904) 487-2142